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SAFETY & OPERATIONS DEPARTMENT
FACSIMILE TRANSMISSION COVER SHEET

Please deliver the following pages to:

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ADDITIONAL COMMENTS:

DAVID – IN CHECKING DOCKET No. 2277, I FOUND ATA'S JULY 11, 1996 SUPPLEMENTAL COMMENTS WHICH REFERRE TO OUR ORIGINAL COMMENTS WHICH WERE RECEIVED BY FHWA ON MAY 12, 1996. THE ORIGINAL COMMENT ARE BEING SENT TO YOU FOR PLACEMENT IN THE DOCKET. THANKS FOR YOUR HELP.

Total Number of pages (including cover sheet): 19

Before the

FEDERAL HIGHWAY ADMINISTRATION
U.S. DEPARTMENT OF TRANSPORTATION

MAY 13, 1996
WASHINGTON, DC

Comments of

AMERICAN TRUCKING ASSOCIATIONS, INC.

On

SAFETY PERFORMANCE HISTORY OF NEW DRIVERS

FHWA Docket No. MC-96-6
Federal Register [61 Fed. Reg. 10548, March 14, 1996]

Without Trucks America Stops

FOREWORD

The American Trucking Associations (ATA) with offices at 2200 Mill Road, Alexandria, VA 22314-4677, is a federation with affiliated associations in every state and the District of Columbia. With more than 4,000 direct members, plus the members of its affiliated associations, and the ATA Conferences representing specialized segments of the industry, ATA, in the aggregate, represents every type and class of motor carrier operation in the country, for-hire and private.

ATA has been involved in every aspect of the Federal Motor Carrier Safety Regulations including matters affecting the qualification of drivers.

The ATA Safety Department reviews legislative and regulatory proposals, coordinates the solicitation of industry views, and develops and submits, in rulemaking proceedings, comments reflecting trucking industry policy. In addition, the department develops educational programs and materials which assist motor carriers in meeting their obligation for safe operations and compliance with regulations.

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General

ATA submits these comments in response to the Notice of Proposed Rulemaking (NPRM) of the Federal Highway Administration (FHWA) Docket MC-96-6, Safety Performance History of New Drivers (61 Fed. Reg., 10548, Thursday, March 14, 1996). ATA has solicited the views of the Regulations Committee of the ATA Safety Management Council and has been in contact with other industry safety organizations regarding the proposals of this NPRM.

It is the consensus that, in principle, the proposed amendments of the Federal Motor Carrier Safety Regulations (FMCSRs) are beneficial and will enhance the ability of motor carriers to obtain specific, objective information on important aspects of the prior safety performance of driver-applicants beyond that now generally furnished in response to inquiries. Despite overall support, there are a number of specific concerns which the industry believes must be resolved in the promulgation of final rules.

Issues of Concern to the Trucking Industry

Issue #1. Limit the scope of the inquires mandated in §382.413(a) to a more reasonable level by eliminating the need for employers to conduct costly and burdensome investigations and make inquiries beyond the scope of motor carrier operations

Issue #1A. Limit the scope of inquiries mandated in subparagraphs (a)(i) and (ii) to those instances "known" to the previous employer.

Discussion. Under the proposed rule, prospective employers would be required to inquire about accidents or violations of alcohol or drug regulations without any limitation as to whether or not the previous employer had knowledge of the situation. Carriers have expressed a concern that they could be held in violation of the regulations if they failed to transmit information on an incident which was not in their records and which they were not aware of. We believe that FHWA may have intended that previous employers provide only information of which they have knowledge. It is imperative that this limitation be clearly expressed in the final rule.

As described below, ATA recognizes the possibility that the driver could violate some provision of the alcohol and/or drug regulations without being detected by the employer then using the driver's services. For example, a driver might decide to have a glass of beer with a meal, and immediately resume driving. If the driver had no accident, did not undergo a roadside check, or the incident was not reported by a third party, the carrier would never have knowledge of the violation.

In processing a subsequent application for employment as a driver,

this situation might come to the attention of the prospective employer from an outside source. For example another employee of the prospective employer might have witnessed the incident described above. The previous employer could be considered to be in violation for its failure to transmit the information on a situation of which it was unaware. Even if the previous employer were able to successfully defend itself, the company would have been put to unreasonable and unwarranted effort and expense in clearing its name of the violation.

Similarly, a driver-applicant might have successfully undergone alcohol or drug rehabilitation under circumstances unrelated to DOT regulations. Within a three-year period, the individual might be hired as a driver by Carrier #1 who did not learn that the driver had completed rehabilitation. The driver could, within three years, then apply for a driving job with Carrier #2 who learns, from another source, pf the alcohol or drug-related incident which occurred prior to the individual's employment with Carrier #1. Carrier #1 is potentially in violation for failure to transmit information which it did not have in its records.

As proposed, these requirements could be taken to require an in-depth background investigation of every applicant, including the use of private investigators. The cost of doing such in-depth investigations would be prohibitive.

ATA Recommendations. For the reasons outlined above, we recommended that the language of §§382.413(a)(i) and (a)(ii), respectively, be amended to read as follows (emphasis supplied):

"(i) Known violations of the prohibitions. . . ."

"(ii) Known failure to undertake or complete. . . ."

Issue #1B. The proposed requirement to check for violations of alcohol and drug regulations of other DOT agencies is unreasonable.

Discussion: This additional level of inquiry is not mandated by Section 114 of the Hazardous Materials Act. FHWA must remember that most motor carriers are small business and that a manager typically performs any or all of the functions as terminal manager, dispatcher, salesman, safety director, maintenance manager, mechanic, and relief driver. From the questions regularly directed to ATA, we know that these people are having a difficult time coping with the regulations that apply directly to their operations.

To expect these people, or even managers who specialize in particular phases of motor carrier operations, to also know which categories of employees are subject to alcohol and drug testing requirements applicable to another mode of transportation creates an unwarranted burden.

For the motor carrier industry, the requirements are straightforward applying only to persons required to possess a Commercial Driver's License (CDL). In other modes, the situation is more complex.

For example, the requirements of the Federal Railroad Administration (FRA) apply to all employees subject to the Hours of Service Act. That Act applies to every person directly involved with the operation of trains, therefore covering many classes of persons in addition to train crew members.

A motor carrier manager might lopgically surmise that a driver-applicant who had been a locomotive engineer would have been subject to FRA drug testing, but would be unlikely to know that train dispatchers, tower operators, signal maintainers, car inspectors, or others were also subject to testing. It is our understanding that alcohol and drug testing requirements of the Federal Aviation Administration (FAA) also cover persons in job categories that motor carrier managers are unlikely to recognize as having been subject to that agency's alcohol and drug rules. We have, for example, been told that the security personnel who man the screening equipment at airline gates are subject to alcohol and drug regulations of FAA. Because such personnel are often employees of a security agency rather than of the airline, trucking industry managers would have no reason to believe that they would need to make alcohol and drug inquires with respect to a person who had

previously held such a position.

ATA Recommendation. Delete the proposed requirement for motor carriers to check for violations of alcohol and drug rules of other DOT agencies.

Issue #1C. The "daisy-chain" requirement of §382.413(a)(2) for passing on information from one previous employer to another previous employer.

Discussion. It is axiomatic that as information is passed from hand to hand, the likelihood of errors increases proportionately. The proposed requirement for one previous employer to pass along all of the information it has received from other previous employers creates just such an opportunity for errors, for inadvertent and unavoidable technical violations, and more opportunities for disaffected applicants to take legal action against one or more previous employers. No employer should be required to provide information on situations other than those which occur during the driver's period of service with that carrier.

A further concern is the potential unfairness to the driver where an earlier previous employer has gone out of business. If FHWA retains the requirement to pass along the information, itself, a driver could be prejudiced by information which can neither be

verified nor corrected.

As an alternative, ATA suggests a requirement that each prior employer provide the names of all known earlier prior employers. This will maintain the ability of a prospective employer to obtain a full employment history without the pitfalls of accumulating and transmitting possibly unverifiable information.

ATA Recommendation. If §382.413(a)(2) is not deleted, we suggest that it be amended to read as follows: "The information obtained from a previous employer pursuant to paragraph (a)(1) of this section shall include the names of all other known previous employers.

Issue #2. §391.,21(c)(1)(ii), Hours of Service Violations.

Discussion. The proposal to require carriers to inquire into "out of service" hours of service violations is not mandated by Section 114 of the Act. No broad-based correlation between hours of service and fatigue-related accidents has been established by the agency, although the matter is under study jointly with ATA's Trucking Research Institute. This proposal is opposed by an overwhelming majority of carriers. Such violations can occur under myriad circumstances from simple errors in arithmetic, the decision of an individual officer that the driver's logs were not up to

date, to the driver's efforts to meet a schedule and keep his/her job.

Carriers generally do not use this information in making hiring decisions and many stated that hours of service violations are not a reliable indicator of a driver's safe driving record. Many commented further that compliance with hours of service regulations is under the direct control of the carrier using the driver's services at the time.

FHWA's own civil penalty data shows that the overwhelming majority of cases involving hours of service violations are brought against the motor carrier and that drivers are only infrequently prosecuted for such violations. We consider this as further evidence that FHWA, itself, views hours of service violations primarily as a carrier safety management issue rather than an indicator of the safe driving ability of the driver.

The proposed requirement for hours of service information opens the door to endless rounds of recriminations between drivers who allege that they had been pressured to violate and denials of such allegations by previous employers. We see little likelihood that such disputes could ever be resolved to the satisfaction of a prospective employer reviewing the information to make a hiring decision.

ATA Recommendation. Delete the proposed requirement of §391.23(c)(1)(ii) for a motor carrier to obtain information on hours of service violations which resulted in the driver being put "out of service."

Issue #3. §390.15(c), Information on Accident Experience.

Discussion. ATA agrees on the importance of obtaining information on the accident record of a prospective driver. It has long been recognized that this information is one of the best predictors of future performance. However, it is essential to amend the language in the final rule to clarify the extent of information to be furnished.

Many motor carriers have expressed their concern that the proposed wording of this paragraph could be construed to require that a previous employer provide copies of the accident reports and diagrams submitted to a government agency or insurance carrier. A requirement of that nature would impose an onerous data-gathering obligation. The burden of providing this additional information goes beyond the needs of the driver selection process. Any need to provide supplemental information would add to the burden. Carriers are concerned that disclosure of such detailed information could be damaging, particularly where settlement has not been reached.

The level of information prescribed in §390.15(b)(1) provides

sufficient information on which to check further against information received through the check of the driver's motor vehicle record (MVR), and through the interview process.

ATA Recommendation. ATA urges that the language of proposed §390.15(c) be amended, by addition of the underlined language, to read as follows:

> "(c) Motor carriers shall make available, within 30 days after receiving a request for information about a driver's accident records from a new or prospective employer, the information pertaining to each accident as prescribed in paragraph (b)(1) of this section."

Issue #4. §§ 383.35(f), 391.21(d), and 391.23(d), Driver's right of review and comment.

Discussion. An unrestricted right to review and comment is not acceptable because it would open the door to endless controversy between driver-applicants, previous employers and prospective employers. It would also be an invitation to drivers to take legal action against former employers on the basis of any information furnished, whether or not required by the FMCSRs. Even if a previous employer were successful in defending itself, the costs of the defense could escalate to prohibitive levels. ATA sees no evidence that Congress intended to provide for a review of

information provided by a previous employer beyond that required in the law.

ATA Recommendations.

Amend the last sentences of §§383.35(f) and 391.21(d), respectively, to read as follows (emphasis supplied):

> " . . . . The employer shall also inform the applicant that he/she will be provided an opportunity to review and comment on information obtained from previous employers as prescribed in §391.23(c)(1)."

Amend §391.23(d) to state (emphasis supplied):

> "The motor carrier shall afford the driver a reasonable opportunity to review and comment on information obtained during the investigation in accordance with paragraph (c) of this section. The motor carrier shall notify the driver of this right at the time of the application for employment."

Issue #5. §§382.413(f), 383.35, 391.21(d), and 391.23(d), Defining the term, "reasonable opportunity."

Discussion. ATA believes that if the term, "reasonable opportunity" is to be specified in the regulations, it is also

necessary to specify the starting point for the period. The only logical starting point is the date on which the prospective driver submits the application for employment.

Moreover, 60 days from the date of the application is a logical time-frame for a "reasonable opportunity." That period of time coincides with the maximum period within which the required investigation must commence, plus the maximum time a response must be made by the previous employer. A 60-day period is also consistent with time prescribed in §382.411 for the driver to request the result of a pre-employment controlled substance test.

ATA Recommendation. Amend the above-named sections of the FMCSRs to allow a driver to request an opportunity to review and comment on information provided by previous employers pursuant to §391.23(d) within 60 days of the date the application for employment is submitted.

Issue #6, The Potential Liability of Employers Providing Information Required By The NPRM.

Discussion. The potential liability arising from providing information about a former employee to a prospective employer continues to be a matter of the greatest concern to motor carriers. It has been a major factor inhibiting the effectiveness of the present provisions of §391.23(c) for the past quarter-century.

The general view, based on experience, is that a mere requirement for notification to drivers set forth in proposed §§383.35(f) and 391.21(d), or as currently required in §391.21, is totally inadequate. We are also concerned with the present provisions and proposed amendments to §382.413 because a driver-applicant is not specifically advised of the regulatory requirements that the prospective employer obtain the information and the obligation of the previous employer to provide it.

We are concerned with the potential for litigation from a driver with respect to information given under this section. Even if the carrier successfully defends its action in providing factual information to the prospective employer, it will have almost surely been put to considerable needless expense to defend itself. Such costs are an unreasonable burden on the industry.

ATA is aware of the legislative proposal which has been introduced in Congress to provide protection to airlines against litigation when transmitting employment history information to a prospective employer. ATA urges FHWA to review this legislation and support expanding it to cover information required to be disclosed under these regulations for truck drivers.

Pending the passage of appropriate legislation, ATA believes that the notification requirements of §§383.35(f) and 391.21(d) should be amended to make specific reference to the elements of safety-

related history to be sought and provided and to state to prospective employees that providing such information to the prospective employer is required under the FMCSRs.

ATA Recommendations.

1. Review pending legislation releasing previous employer from liability in providing specific, objective, safety-related employment information. Take the lead in encouraging the Secretary of Transportation to seek passage of this legislation in a manner which will afford protection to transportation companies in all modes seeking such information on prospective employees in safety-sensitive positions.

2. Amend the provisions of §383.35(f) by inserting the following as the second sentence: "The employer shall advise the applicant that Federal regulations require employment history to be obtained from prior employers with respect to (enumerate the items). . ."

3. Amend the provisions of §391.21(d) by inserting the following language as the second sentence: "The employer shall advise the applicant that Federal regulations require employment history to be obtained from previous employers with respect to (enumerate the items)."

Conclusion and Recommendations

The proposals set forth in the NPRM are generally beneficial and will enhance the ability of motor carrier to secure objective information on the past history of driver-applicants. Nonetheless, employers remain concerned about their vulnerability to lawsuits filed by former employees - a situation which has historically inhibited the interchange of meaningful information.

The industry is also concerned with proposals which will be unduly difficult to comply with and will elicit information which is of limited usefulness in gauging the future safety performance of applicants.

Because of these concerns, ATA recommends the following:

- Limit information provided by a previous employer to instances occurring within the purview of the FMCSRs and which are known to the employer.

- Eliminate the proposed requirement for the "daisy-chain" of information under which one previous employer would be required to transmit to a prospective employer all of the information that had been obtained from earlier previous employers; or, modify the requirement to state that a previous employer shall provide the names of all known earlier previous

employers.

- Clarify the provisions on accident record information to clearly state that the information to be furnished is that summarized in the accident register.

- Delete the proposed requirement to furnish information on "out of service" hours of service violations

- Establish 60 days from the filing of the employment application as the period of time for the driver to request an opportunity to review and comment on information provided by a previous employer and limit the review to those items mandated by the regulations.

- FHWA should take a lead role within the Department of Transportation to seek the passage of Federal legislation to protect prior employers who provide factual information to prospective employers of persons in safety-sensitive positions.

There is an issue concerning the exchange of data which we need to analyze further. The issue will be discussed at an industry meeting in late June. It may be necessary for ATA to file further comments at that point. We respectfully request that FHWA consider any additional comments that are filed prior to June 30, 1996.